INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Summary of argument	5
Argument	7
Conclusion	19
Appendix	20

CITATIONS

Cases:	
Ann Arbor R. Co. v. *United States*, 281 U. S. 658	16
Assigned Car Cases, 274 U. S. 564	18
Cox v. *Hart*, 260 U. S. 427	12
Del., Lack. & West. R. R. v. *United States*, 231 U. S. 363	18
Interstate Comm. Comm. v. *Ills. Cent. R. R. Co.*, 215 U. S. 452	16
Minis v. *United States*, 15 Pet. 423	12
Peck v. *Jenness*, 7 How. 612	15
Platt v. *Union Pacific R. R. Co.*, 99 U. S. 48	15
Rail Lake and Rail Rates Between U. S. Points via Canadian Lines, 96 I. C. C. 633	10, 15
Ryan v. *Carter*, 93 U. S. 78	13
Schlemmer v. *Buffalo, Rochester, &c Ry.*, 205 U. S. 1	13
Southern Pac. Co. v. *Interstate Comm. Comm.*, 219 U. S. 433	16
Texas & Pac. Railway v. *Interstate Com. Com.*, 162 U. S. 197	14
Through Routes and Through Rates, Matter of 12 I. C. C. 163	11
United States v. *Delaware & Hudson Co.*, 213 U. S. 366	18
United States v. *Dickson*, 15 Pet. 141	13
United States v. *Freight Association*, 166 U. S. 290	14
United States v. *Lehigh Valley R. R. Co.*, 254 U. S. 255	18
United States v. *New York Central R. R.*, 263 U. S. 603	16
Statutes:	
Act of July 4, 1789, c. 2, 1 Stat. 24, Sec. 5	17
Act of March 1, 1817, c. 31, 3 Stat. 351, Sec. 4	17
Act of July 18, 1866, c. 201, 14 Stat. 178, Sec. 20	17
Act of February 15, 1893, c. 117, 27 Stat. 455	17

Statutes—Continued. Page

Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988 (U. S. C., Title 46, Secs. 883, 802):

Sec. 27 20

Sec. 38 21

Miscellaneous:

Cong. Record, Vol. 59, pp. 6811, 7348, 7350, 8167, 8401, 8592–8593 12

H. Repts. Nos. 1093, 1102, 1107, 66th Cong., 2d sess. ... 12

30 Op. Atty. Gen. 3 12

37 Op. Atty. Gen. 50 16

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 247

CENTRAL VERMONT TRANSPORTATION COMPANY,
Petitioner,

v.

HARRY M. DURNING, COLLECTOR OF CUSTOMS AT THE
Port of New York

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 14–18) is not reported. The opinion of the Circuit Court of Appeals (R. 23–31) is reported in 71 F. (2d) 273.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 18, 1934 (R. 31). The petition for writ of certiorari was filed August 2, 1934, and was granted on October 8, 1934 (R. 33). The jurisdiction of this Court rests upon Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the proviso contained in Section 27 of the Merchant Marine Act of 1920 exempts from seizure merchandise originating in Vermont and carried over rail lines to New London, Connecticut, thence transshipped to New York City on a vessel belonging to the petitioner.

2. Whether Section 27 of the Merchant Marine Act, if applicable to the petitioner, violates the Fifth Amendment to the Constitution.

STATUTES INVOLVED

The applicable statutes are set forth in the Appendix, *infra,* pp. 20–22.

STATEMENT

The cause was submitted to the District Court on a bill of complaint and a motion to dismiss the bill, each pleading being supported by an affidavit (R. 2–13). The facts so appearing are substantially as follows:

The petitioner was incorporated under the laws of Maine in the year 1908, and its stock, with the exception of certain directors' qualifying shares, was owned by the Central Vermont Railway Company, a corporation organized under the laws of Vermont (R. 2, 3, 7). The stock of the latter company was owned by the Grand Trunk Railway Company, a Canadian corporation (R. 3). In the

following year the petitioner purchased two vessels built in the United States and documented under the laws of the United States, and continuously since that date has operated them between New London, Connecticut, and New York City (R. 3). Subsequently, the Canadian National Railway Company, a Canadian corporation, acquired all the stock of the Grand Trunk Railway Company (R. 3, 8). The Central Vermont Railway, Inc., acquired the property of the Central Vermont Railway Company, and the Canadian National Railway Company acquired all the stock, except the directors' qualifying shares, of the Central Vermont Railway, Inc. (R. 8).

The petitioner and the Central Vermont Railway, Inc., are engaged in the transportation of property, partly by rail and partly by water, under common control, for a continuous carriage between points in the States of Connecticut, Massachusetts, and Vermont and New York City (R. 3, 10). It also transports merchandise originating at points in the western States of the United States, which is routed over Canadian rail lines, and thence over the Central Vermont Railway, Inc., and its connecting water carrier, the petitioner (R. 4, 10). The Interstate Commerce Commission has approved certain through routes with corresponding rates therefor (R. 4), the operation of the boats by the petitioner (R. 5), the ownership of the stock of the petitioner by the Central Vermont Railway,

Inc., and the ownership of the stock of the Central Vermont Railway, Inc., by the Canadian National Railway Company (R. 4, 5, 9).

The respondent seized certain merchandise transported by the petitioner for the purpose of forfeiting the same (R. 5–6). This merchandise had originated at St. Albans, Vermont, thence proceeded over the line of the Central Vermont Railway, Inc., to New London, Connecticut, where it was placed upon one of the boats of the petitioner, and thence was transported by water to New York City (R. 5–6). The petitioner thereupon instituted a suit in the United States District Court for the Southern District of New York asking for a return of the merchandise, and that an injunction be granted enjoining the respondent from seizing any other merchandise which it so brought to New York City (R. 2, 6, 11). The merchandise was seized by the Collector of Customs under authority of Section 27 of the Merchant Marine Act of June 5, 1920 (R. 12, 15).

The District Court denied the respondent's motion to dismiss the bill and granted a temporary injunction restraining the respondent from making any further seizures of the petitioner's freight during the pendency of the suit (R. 17, 19). On appeal the United States Circuit Court of Appeals for the Second Circuit reversed the decision of the District Court (R. 45).

SUMMARY OF ARGUMENT

I

Section 27 of the Merchant Marine Act of 1920 prohibits, under penalty of forfeiture, transportation of merchandise between ports of the United States in a vessel other than one owned by a citizen of the United States. Under the provisions of Section 38 of the Act the petitioner is not a citizen of the United States. Merchandise transported by the petitioner, therefore, between ports of the United States is subject to forfeiture, unless the petitioner comes within the proviso in Section 27 of the Act, or unless the Act does not apply to the petitioner.

A proviso in Section 27 exempts from the operation of the Act merchandise which has been transported between points within the continental United States over through routes recognized by the Interstate Commerce Commission, for which routes rate tariffs have been filed with the Commission, when such routes are in part over Canadian rail lines and their own or other connecting water facilities. The merchandise involved in the instant case was transported between St. Albans, Vermont, and New York City, and did not pass over a Canadian rail line. Ownership of the stock of the rail line by a Canadian citizen does not make the line a "Canadian rail line" within the meaning of the statute. The route from St. Albans to New York

City was not a part of a through route over Canadian rails. Different routes can pass over the same rails. The history of the Merchant Marine Act confirms this interpretation, especially as a proviso is to be strictly construed. The petitioner in the instant case does not come within the proviso.

Section 27 applies to the petitioner, notwithstanding the fact that it is subject to regulation by the Interstate Commerce Commission. If the fact were otherwise, there would have been no necessity for including the proviso in Section 27, as the fact that the petitioner was under the control of the Interstate Commerce Commission automatically would have exempted it. There is no departmental interpretation to the contrary.

II

Section 27 of the Act does not violate the Fifth Amendment to the Constitution. It is a restatement in more strict terms of an old, settled policy of the United States which reserved to its own citizens the privilege of engaging in the coastwise trade. The petitioner has not been deprived of any property, and the statute itself constitutes a prohibition of a nature which the United States has a right to impose. More stringent regulations than this have been upheld by this Court. There is no error, and the judgment of the court below should be affirmed.

ARGUMENT

I

The Merchant Marine Act of 1920 provides that, within the meaning of the Act, no corporation shall be deemed to be a citizen of the United States unless seventy-five percent of the stock thereof is owned by citizens of the United States, and that such stock shall not be deemed to be owned by citizens of the United States if the title is not vested in such citizens free from trust or fiduciary obligation in favor of any person not a citizen of the United States (Section 38, *infra,* p. 21). It is admitted that the stock of the petitioner is not so owned (R. 4 and 5), the beneficial ownership being vested in the Canadian National Railway Company, a Canadian national, and that therefore the petitioner is not a citizen of the United States as defined by the Act. The operative part of Section 27 of the Act, *infra,* p. 20, provides that no merchandise, under penalty of forfeiture thereof, shall be transported by water or by land and water in any vessel other than one built in and documented under the laws of the United States and owned by persons who are citizens of the United States. The section also contains a proviso excepting in certain circumstances the application of the Act. It is clear, therefore, the petitioner not being a citizen of the United States, that Section 27 of the Merchant Marine Act authorized the action of the respondent, unless the

petitioner came within the proviso of that section or unless the statute did not apply to it.

The proviso itself exempts from the penalty of Section 27 merchandise transported between points within the continental United States over through routes recognized by the Interstate Commerce Commission, for which routes rate tariffs have been, or shall be, filed with said Commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities.

Approximately two-thirds of the freight carried by the petitioner admittedly comes within this proviso, and it is not subject to forfeiture, the freight in fact having passed over Canadian rail lines. The remaining one-third, which originates at points within New England for carriage to New York, or which originates in New York City for carriage to points within New England, constitutes the type of carriage by the petitioner which the court below found to fall outside the proviso and to be subject, therefore, to the operative part of Section 27.

The merchandise which was seized by the respondent originated in St. Albans, Vermont, traveled over the lines of the Central Vermont Railway, Inc., to New London, Connecticut, where it was transshipped to a boat of the petitioner, and thence carried to New York City. It never passed over any Canadian rail line, notwithstanding an argument of the petitioner to the contrary.

The petitioner contends, since under the provisions of the Merchant Marine Act no corporation constitutes an American national unless seventy-five percent of the stock of the corporation is beneficially owned by American citizens, that the Central Vermont Railway, Inc., is a Canadian corporation, the beneficial ownership being located in Canada. From this premise the petitioner concludes that the Central Vermont Railway, Inc., was a Canadian rail line, and that inasmuch as a part of the route traversed by the merchandise in question had been over the lines of that railway, it had in effect been over Canadian rail lines. It is obvious from a reading of the proviso that the word "Canadian" as applied to rail lines was used in a geographical and not in a political sense. Nor does it appear that the Central Vermont Railway, Inc., necessarily was a Canadian corporation. The United States might, for the purpose of the Act, divest such a corporation of its American nationality. It does not follow, however, that the corporation would acquire any other nationality. Whether in these circumstances the railway has acquired Canadian citizenship depends upon the laws of Canada. Foreign laws must be proved as a matter of fact, and no such proof has been offered in this case. That question, therefore, is not before this Court.

The petitioner also asserts that in order to come within the proviso it was not necessary that the

merchandise actually pass over a Canadian rail line, but only that the lines over which it passed should constitute a part of the through route recognized by the Interstate Commerce Commission and for which rate tariffs have been filed. This argument proves too much. If it were held to be correct, the petitioner would be at liberty to transport merchandise of any nature between New London, Connecticut, and New York City, inasmuch as it, being a part of the through route, would be exempt from the necessity of having the merchandise in question move over Canadian rails. It is particularly important to note that the Interstate Commerce Commission has failed to determine what constitutes a recognition on its part of a through route within the meaning of the proviso. In *Rail Lake and Rail Rates Between U. S. Points via Canadian Lines,* 96 I. C. C. 633, the Commission stated that it was in doubt as to what action on its part constituted recognition, and suggested that the filing with it of through rate tariffs might in itself constitute such recognition. It further stated that if some other type of recognition were required, the statute failed to point out the form that such recognition should take. In these circumstances merchandise originating at any point in New England on this, or some other through route, could be transshipped in foreign vessels to any port in the United States, including, of course, the Pacific Coast, by the simple expedient of filing with the Interstate Commerce Commission rate tariffs

to the desired port. In this manner the plain intent of Congress to reserve to its own citizens the field of coastwise shipping would be defeated.

An analysis of the language of the proviso, however, discloses no such meaning as that advanced by the petitioner. The proviso excepts "merchandise transported * * * over through routes * * * when such routes are in part over Canadian rail lines and their own or other connecting water facilities."

The statute does not state that it exempts merchandise transported over any part of the route any other part of which is over a Canadian rail line and connecting water carrier. The plain language of the statute indicates that part of the transportation must be in fact over Canadian rail lines. A through route is a continuous line of railway formed by an arrangement, express or implied, between connecting carriers. *Matter of Through Routes and Through Rates,* 12 I. C. C. 163, 166. The same rail lines may frequently be used by different through routes. For example, freight moving into the District of Columbia and originating at a point in New England might traverse the same rail lines as freight originating in Pittsburgh or Chicago, yet it could not be stated that this freight moved over a part of the through route from either Chicago or Pittsburgh to the District of Columbia. The merchandise in the case at bar did not move over a through route over Canadian rail lines. The through route over which it moved commenced at

St. Albans, Vermont, and while traversing the same rails as those traversed in part by the through route over Canadian rails, it constituted a separate and distinct through route and not one of the type described in the proviso.

The history of Section 27 of the Merchant Marine Act confirms this interpretation. It was not a part of the bill when it was introduced in the House of Representatives, nor when it was passed by that body, but, after the bill had reached the Senate, Section 27 was offered as an amendment to the bill, and as passed by the Senate it contained substantially the operative part of Section 27 without any proviso. It was placed in the bill for the purpose of guarding against evasions possible under existing law, and reference was made to 30 Op. Atty. Gen. 3. Congressional Record, Vol. 59, pp. 7348–7350, 6811. The bill, after its adoption by the Senate, went to conference, where it was further amended in conference by inserting the proviso. H. Repts. Nos. 1093, 1102, 1107, 66th Cong., 2d sess.; Cong. Rec., Vol. 59, pp. 8167, 8401, 8592–3. The obvious purpose of the proviso was to permit transportation by water where the merchandise had in fact passed over Canadian rails.

A proviso, as stated by this Court, has the effect of exempting something from the operative effect of the substantive enactment to which it is attached. *Minis* v. *United States,* 15 Pet. 423; *Cox* v. *Hart,* 260 U. S. 427, 435. A proviso is to be strictly construed. It takes no case out of the enacting clause,

unless that case falls fairly within the terms of the proviso, and those who set up such exception must establish it as being within the words as well as the reason thereof. *United States* v. *Dickson,* 15 Pet. 141, 165; *Ryan* v. *Carter,* 93 U. S. 78, 83; *Schlemmer* v. *Buffalo, Rochester, &c. Ry.,* 205 U. S. 1, 10. The argument of the petitioner in this case fails to meet the requirements so laid down. Conversely, we submit, a fair reading of the proviso in question indicates that merchandise, to be exempt from the provisions of Section 27 of the Merchant Marine Act, must have passed over a Canadian rail line.

The petitioner finally contends that it was under the control of the Interstate Commerce Commission, which approved the routes and accepted rate tariffs therefor, and that the statute does not apply to it. The argument appears to be substantially as follows: The petitioner cannot be both subject to the Interstate Commerce Commission, and also to the Commerce Department, which latter has charge of the administration of the Merchant Marine Act; that, being subject to the Interstate Commerce Commission, nothing in the Merchant Marine Act applies to it; or, at the most, that if any part of the Act applies to it, that part should be enforced by the Interstate Commerce Commission, and the Interstate Commerce Commission, having approved of its operation, must be held to have interpreted the law as not applying to the petitioner.

This argument on the part of the petitioner, we submit, is based on several misconceptions. The

Interstate Commerce Commission has certain jurisdiction conferred upon it by law. As far as the record discloses, that jurisdiction found expression solely in the acceptance of rate tariffs and the approval of the ownership of the petitioner's stock by the Central Vermont Railway, Inc. It may well be that the Department of Commerce could not regulate the petitioner's rate, or interfere with the field within which the Interstate Commerce Commission has jurisdiction, but this of itself would not preclude the Department of Commerce from having jurisdiction of the enforcement of Section 27. Nor would the fact that the Interstate Commerce Commission had exclusive jurisdiction over the petitioner preclude the application of Section 27 of the Act. This Court has frequently held that notwithstanding such exclusive control, a different statute dealing with the same subject matter is applicable. *Texas & Pacific Railway* v. *Interstate Commerce Commission,* 162 U. S. 197, 221; *United States* v. *Freight Association,* 166 U. S. 290.

It is likewise apparent that the statute was intended to apply to carriers situated as is the petitioner. The proviso refers specifically to carriers whose rate tariffs have been approved by the Interstate Commerce Commission. Had the mere fact that such carriers were subject to some degree of control by the Interstate Commerce Commission been sufficient to exempt them from the operation of the statute, there would have been no necessity

for the addition of the proviso. The law is well settled that a statute must be construed so as to give effect to every provision thereof. *Platt* v. *Union Pacific R. R. Co.*, 99 U. S. 48, 66; *Peck* v. *Jenness*, 7 How. 612, 622. It is apparent, therefore, that the petitioner is subject to the provisions of the statute.

The duty of administering the Merchant Marine Act has been placed in the Department of Commerce, and Section 27 is an integral part of that Act. Conversely, the Interstate Commerce Commission has denied that it has any concern with the enforcement of that section. *Rail Lake and Rail Rates, Etc.*, 96 I. C. C. 633, *supra*; 37 Op. Atty. Gen. 50. Nor does it appear to be of importance which body had jurisdiction. It was the duty of the appropriate governmental agency to enforce the statute according to its letter; and had either decided that the act of the petitioner in transporting freight originating in the United States constituted no violation of the statute when that freight had not passed over a Canadian rail line, such decision would have constituted no defense in an appropriate action to enforce the penalty. Whether Section 27 of the Merchant Marine Act applies to the petitioner is a question of law to be determined by the courts and not by the Interstate Commerce Commission, which has no power to decide questions of law. It is at the most an administrative body with certain quasi-judicial functions, but it is in no sense a judicial body. *United States* v. *New*

York Central R. R., 263 U. S. 603; *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658; *Interstate Commerce Commission* v. *Illinois Central Railroad Co.*, 215 U. S. 452, 470; *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433.

The petitioner states that it had been engaged in such transportation for over twelve years when the instant case was commenced, and that the Department of Commerce had been aware both of this and the fact that the Canadian National Railway was the beneficial owner of its stock. We see no necessity to consider any inference which might be drawn from this recital of facts, for the reason that the Department of Commerce did not become aware of the alien ownership of the petitioner's stock until shortly before the institution of the case at bar. This clearly appears from the opinion in this case by the Attorney General, 37 Op. Atty. Gen. 50.

In the light of the foregoing, therefore, we submit that the petitioner comes plainly within Section 27 of the Merchant Marine Act; and that it was not exempted under the proviso appearing therein.

II

The petitioner urges that if the construction given to Section 27 of the Merchant Marine Act be confirmed, a situation would then be presented wherein it has been deprived of property without due process of law, in violation of the Fifth Amend-

ment to the Constitution; and that being confronted with such a situation, this Court would be called upon to declare that section unconstitutional. This contention was, we submit, properly rejected by the court below:

Section 27 of the Merchant Marine Act of 1920 is a restatement of a policy of long standing on the part of the United States. From the earliest days the United States has endeavored by law to reserve to its own citizens exclusively the coastwise trade of the nation.[1]

The Merchant Marine Act of 1920, as its name imports, was intended to promote the maritime commerce of the United States. Accordingly, the inclusion therein of Section 27, which constituted a more stringent restriction upon aliens engaging in any manner in the coastwise trade, constituted no departure from the old, recognized policy of the United States.

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[1] Chapter 2, Section 5, 1 Stat. 24, 27, gave preference to citizens of the United States by allowing a discount on duties paid for goods imported in such vessels.

Chapter 31, Section 4, 3 Stat. 351, prohibited transportation of merchandise from one port of the United States to another in a vessel belonging wholly or in part to a subject of any foreign power.

Chapter 201, Section 20, 14 Stat. 178, 182, provided for the forfeiture of merchandise shipped from a port of the United States in a foreign vessel to a foreign port and thence reshipped to the United States.

Chapter 117, 27 Stat. 455, forbade shipment in a foreign vessel from one port in the United States to another port in the United States via a foreign port.

The transportation effected by the petitioner would always have been illegal but for the fact that the petitioner was an American corporation. It is, we submit, not beyond the powers of Congress to give statutory recognition to the fact that where the beneficial ownership of the stock of a corporation is in an alien the boats of the corporation are in effect foreign owned. The corporation, as such, may sell its property, or its stock may be sold to persons meetings the requirements of Section 38 of the Merchant Marine Act. The petitioner having these privileges, it is not perceived wherein it can properly invoke the Fifth Amendment to the Constitution.

The regulation in question is no more severe than those prohibiting transportation by a railroad of its own commodities where the property for producing such commodities had been acquired by the railroad when such transportation was still lawful. *Del., Lack. & West. R. R.* v. *United States,* 231 U. S. 363; *Assigned Car Cases,* 274 U. S. 564; *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 415; *United States* v. *Lehigh Valley R. R. Co.,* 254 U. S. 255.

We submit that there is no merit to the petitioner's contention that the regulation imposed upon it under the Merchant Marine Act, which regulation expresses a settled policy of the United States, violates any of its rights under the Fifth Amendment to the Constitution.

CONCLUSION

We respectfully submit that the judgment of the court below is correct and should be affirmed.

J. CRAWFORD BIGGS,
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GEORGE C. SWEENEY,
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NOVEMBER 1934.

APPENDIX

STATUTES

The Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988, 999, 1008 (U. S. C., Title 46, Secs. 883, 802), provides in part:

> SEC. 27. That no merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by sections 18 or 22 of this Act: *Provided,* That this section shall not apply to merchandise transported between points within the continental United States, excluding Alaska, over through routes heretofore or hereafter recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall hereafter be filed with said commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities: *Provided further,* That this section shall not become effective upon the Yukon river until the Alaska Railroad shall be completed and

the Shipping Board shall find that proper facilities will be furnished for transportation by persons citizens of the United States for properly handling the traffic.

SEC. 38. That section 2 of the Shipping Act, 1916, is amended to read as follows:

"SEC. 2. (a) That within the meaning of this Act no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president and managing directors are citizens of the United States and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof, but in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum.

"(b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

"(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to 75 per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if 75 per centum of the voting power in such corporation is not vested in citizens of the United States; or (c) if, through any contract or understanding it is so arranged that more than 25 per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

* * * * *

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